IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE

[2020] NZERA 285
3102192

	BETWEEN	TIMOTHY GEORGE de WYS Applicant
		JESSE MONRO JENNEY Applicant
	AND	SOLLY'S FREIGHT (1987) LIMITED Respondent

Member of Authority:	Philip Cheyne
Representatives:	Paul Matthews, counsel for the Applicants Brian Nathan, counsel for the Respondent
Investigation Meeting:	8 July 2020
Submissions Received:	10 and 17 July 2020 from the Applicant 16 July 2020 from the Respondent
Date of Determination:	22 July 2020

DETERMINATION OF THE AUTHORITY

A. Solly's Freight (1987) Limited is to pay Timothy George de Wys $10,000.00, pursuant to s 123(1)(c)(i) of the Act.

B. Solly's Freight (1987) Limited is to pay Timothy George de Wys $18,907.00, pursuant to s 128(2) of the Act.

C. Solly's Freight (1987) Limited is to pay Jesse Monro Jenney $15,000.00, pursuant to s 123(1)(c)(i) of the Act.

D. Solly's Freight (1987) Limited is to pay Jesse Monro Jenney $14,132.00, pursuant to s 128(2) of the Act.

E. Costs are reserved, subject to the timetable set out below.

F. The claim for a penalty for breach of good faith is dismissed.

Employment relationship problems

[1] Timothy de Wys and Jesse Jenney were employed by Solly's Freight (1987) Limited[1] for several years based in Christchurch until they were dismissed on 2 April 2020. Mr de Wys and Mr Jenney each say their dismissal is unjustified. They claim compensation and reimbursement, a penalty for breach of good faith and costs. The grievances were raised with SFL on 23 April and 28 April respectively and were lodged in the Authority by a single statement of problem.

[2] SFL is a long-standing family business established in Collingwood and with depots there, Takaka, Richmond, Blenheim and Christchurch. It is a diversified trucking and general contracting business and had more than 170 employees at the time it dismissed Mr de Wys and Mr Jenney. SFL says that each dismissal is justified for redundancy and arose directly from the impact on its freighting business caused by the Coid-19 Level 4 lockdown.

[3] Despite mediation, the problems were not resolved.

[4] The facts overlap and both claims were investigated jointly without objection. As grievance claims, I will set out some common background circumstances before assessing whether the company's actions and how it acted for each employee were what a fair and reasonable employer could have done in all the circumstances at the time. If the dismissals are unjustifiable I will assess remedy claims. Finally I will consider the penalty claims.

Background

[5] The New Zealand Government announced on 23 March 2020 that the country was at Covid-19 Alert Level 3 and would move to Alert Level 4 at 11.59pm on Wednesday 25 March. SFL provided essential services but its operations also included non-essential services. SFL senior managers (including directors)

[1] I will refer to the respondent as SFL or the company.

considered that the company's operation generally and in Christchurch would be significantly affected. They had been considering the possible effects on the business of the pandemic in the lead-up to the 23 March announcement.

[6] Standard form individual employment agreements between SFL and the applicants include a clause for notice of termination of employment and permit SFL to pay notice in lieu. The agreements make no specific provision for redundancy, except to exclude compensation when employment is terminated due to redundancy. Neither agreement defines redundancy. However, redundancy in the context of employment is well understood to include termination of employment where the position occupied by the employee is superfluous to the employer's business needs.

[7] SFL reduced the size of its workforce in response to changed business conditions brought about by the Covid-19 restrictions. The workforce reduction was achieved by not offering work to a number of casual employees, not further engaging the services of some independent contractors and dismissing a number of permanent employees in Christchurch and at other branches. The dismissals of Mr de Wys and Mr Jenney were part of this workforce reduction. However, a business decision to reduce employee numbers is not sufficient on its own for an employer to meet the statutory test for justification of a dismissal.[2]

[8] SFL applied for the Government Covid-19 Wage Subsidy for its employees on Wednesday 25 March 2020. The application was accompanied by several declarations including that the employer had discussed the application with the named employees. Mr de Wys and Mr Jenney were amongst the many employees named in the application. The online application generated a response acknowledging the application and advising that Work and Income would "let you know once the payment has been made. We aim to make payments 5 working days after we confirm the details of your application."

[9] The evidence is that SFL also applied on 25 March for registration as an essential service and received confirmation from the Ministry of Primary Industries at 6.15pm on 27 March about the essential services it could supply. I accept this evidence.

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[2] *Grace Team Accounting Ltd v Brake* [2014] ERNZ 129.

[10] Michael Welsh is the Christchurch branch manager for SFL. Wynne Adrian is the systems manager whose responsibilities include human resources. Mr Aberhart is a manager. Merv Solly is the managing director. Mr Adrian, Mr Aberhart and Mr Solly work in the Nelson/Golden Bay region. Mr Solly instructed Mr Adrian to get from Mr Welsh a list of Christchurch staff to be made redundant. Mr Welsh says he was called and told that half of the Christchurch staff of 22 would be made redundant. Mr Adrian's evidence is that the list request was on Monday 23 March, the day New Zealand entered into Alert Level 3. Mr Welsh's recollection is that this call was on a Monday and it took him a couple of days to do a list. He did not specify dates. At some point he had a further discussion with Mr Adrian to the effect that he could not operate the branch with only 11 staff. That resulted in a decision that seven Christchurch branch staff would be made redundant. Mr Adrian's evidence is that he received the list on Monday 30 March. After the investigation meeting, counsel provided an email dated 31 March from Mr Welsh to Ed Solly (a director) copied to Mr Aberhart listing Christchurch staff with Mr Welsh's selections "In the event we had to make 7 people redundant …" Counsel advises that there were no other written communications. I find that Mr Adrian's recollection of the timing of the initial request to Mr Welsh to make a list of Christchurch staff to make redundant is probably correct. The initial request to Mr Welsh was on 23 March and Mr Welsh completed the Christchurch list on 31 March.

[11] Mr Adrian's evidence is that the list was based on factors such as work ethics, absenteeism, equipment damage, attitude to the job (including flexibility) and family situation. His evidence is that these criteria came from discussion between the senior managers, including the company directors. SFL had not had any previous redundancy situation, but one of the managers had relevant experience from previous roles. Mr Welsh's prepared evidence is that he used these factors to develop the list he provided. However, when questioned he did not attribute the criteria he used to prepare his list to an instruction from Mr Adrian to apply the criteria discussed by the senior managers. It is likely that Mr Welsh's recollection is not accurate and that the criteria he used came from Mr Adrian passing on the outcome of the senior managers' discussion about criteria.

[12] Before the 23 March announcement, SFL ensured it had up-to-date contact details and employees' preferred communication method given the uncertainties of the Covid-19 situation. SFL sent a letter dated 31 March 2020 signed by the

managing director (Mr Solly) to all its employees, including Mr de Wys and Mr Jenney. The letter says the times are uncertain and unprecedented and it is appropriate that "I write to let you know where we are at." It advises that the effect of the lockdown is that freight cannot move, directly impacting on the company's operation. It says that the company had applied for the wage subsidy but had not had a response to date, describing the subsidy as critical to the company and "even more so to you, our valued employee. If the subsidy is received well and good, if not changes to our operations will become absolutely necessary." The letter goes on to say that even with the subsidy it could not make any long term guarantees about the future. The company would use its best endeavours to carry on but "restructure may become necessary in time". It ends saying "We will keep you informed as time goes by." The letter did not exclude restructuring but nor did it say that it was currently under consideration.

[13] Mr Welsh received the 31 March letter, like other employees. Although he had completed working on the list of names to be made redundant on the same day as the 31 March letter, Mr Welsh's evidence is that he thought "it would be down the track a bit", meaning that redundancy for those on his list was not imminent. There is no reason to doubt Mr Welsh's evidence on this point. Consistent with that view, Mr Welsh at a toolbox meeting for Christchurch staff around the same time said that he did not think there was too much to worry about.

[14] On Thursday 2 April, Mr Welsh received a call from Mr Adrian who told him that SFL was going to send redundancy letters to those on the Christchurch list. Mr Welsh asked Mr Adrian to hold off so he had the opportunity first to speak to the affected staff. Mr Welsh then spoke individually to those who would receive the redundancy letter and let Mr Adrian know when he had done this. Mr Adrian then arranged for the letters to be sent, using the staff communication preferences which had earlier been confirmed and used for the 31 March letter.

[15] Mr Adrian's evidence is that SFL had not at that point heard an outcome of its wage subsidy application. However, he received a phone call from an MSD official in the morning on 2 April. His evidence, which I accept, is that he told the official that some employees were to be excluded from the subsidy application. The official sought confirmation from a director so there was then a call between Mr Solly and the official. That was followed by an email from the official timed at 10.48am requesting

the names to be excluded. The email ends with confirmation that the official was not an investigator but the "processor of the wage subsidy application." The MSD file information shows the application was put on hold at 10.52am waiting for the list of excluded names. Mr Adrian later provided that list by email. His email starts "Afternoon…" so I infer it was after midday on 2 April.[3] The MSD information shows 3 April as the date it recorded that 7 employees were removed from the application "as no longer with the company" and as the subsidy payment date.

[16] Mr Adrian's prepared evidence is that he received an email on Saturday 4 April confirming payment of the wage subsidy but he did not see the message until Monday 6 April. His oral evidence is that he received a txt at 10.40am on Saturday, which he did not read until Monday morning. Neither the txt nor the email was produced in evidence. Both means of contact were included in the application so either or both could have been used to advise SFL that the payment had been actioned.

[17] The evidence about the exchanges with the official in the morning on 2 April in the context of the eligibility declaration in the subsidy application leads me to conclude that on the morning of 2 April SFL knew or ought to have realised that it would soon receive the government wage subsidy. It was not or should not have been a surprise for SFL to receive confirmation of payment on 4 April by email and/or txt and the funds available in its bank account on 6 April.

[18] Mr Adrian confirmed that SFL has a close and supportive relationship with its bank and that its decision about redundancies was not influenced by a concern about potential receivership, liquidation or insolvent trading. In short, SFL could make its own decisions about how best to respond to the business circumstances it faced.

Dismissal of Mr de Wys

[19] Mr de Wys was employed from March 2018 as a driver. His signed individual agreement provides for four weeks' notice of termination. Mr de Wys worked as a single-runner and is a class 5 driver. His work usually involved line-haul driving between Christchurch, Blenheim and Richmond. Sometimes Mr de Wys would swap units with a Richmond based driver part-way through the trip so they could each

[3] The email was archived in SFL's system and was later forwarded to counsel. A printed copy of the email shows its send date as 1 April, but that must be wrong.

return to their home base the same day. All or nearly all the goods carried by Mr de Wys were not essential goods under the Covid-19 restrictions.

[20] The agreement provides that Mr de Wys is based in Christchurch but shall perform the work at such locations as may be required by the employer, including locations dictated by the driving duties. The position description says that its purpose is "Driver for all truck types", lists various duties and includes "Such other duties as the employer may reasonably require." The hours of work are between 40 and 70 hours in any seven day period, Monday to Sunday.

[21] Mr de Wys drove to Blenheim and Nelson before the Covid-19 Level 4 lockdown. His evidence is that there was talk amongst his bosses of doing normal freight (contrary to the Level 4 rules), which was concerning for him given his health condition. Mr de Wys says he rang Mr Welsh who told him that if he goes off work he would have to apply personally for a government grant as Mr Solly had said that the company was not getting the grant. This discussion must have been on or before 26 March. Mr de Wys repeated that information to the dispatcher in Nelson. Later, Mr de Wys was called in to see Mr Aberhart, a Nelson manager, who asked him "What's this nonsense you are telling people", and told him that SFL would only be carrying essential goods. Mr de Wys told Mr Aberhart that he would report SFL if he saw non-essential goods being carted.

[22] Mr Aberhart and the dispatcher did not give evidence. In his oral evidence, Mr de Wys said that the dispatcher at Nelson responded that it did not match what he had been told. The dispatcher went and spoke to Mr Aberhart and came back to tell Mr de Wys that "Mike says it's bullshit". Mr de Wys then went to speak to Mr Aberhart and told him that he would report SFL if non-essential goods were carried. Whether or not Mr de Wys initiated the exchange with Mr Aberhart, I accept that he told Mr Aberhart that he would report SFL if he saw non-essential goods being carried. This was on either 25 or 26 March.

[23] Mr de Wys returned to Christchurch on 26 March, carrying two empty containers. On his return, Mr de Wys had an exchange with Mr Welsh. Mr de Wys told me during the investigation meeting that he had recorded this exchange. Mr Welsh was not aware of being recorded. The recording was lodged with a transcript after the meeting. I need only summarise part of the recording. Mr de Wys expressed

his view that he could not live on $400 per week. Mr Welsh explained that Mr Aberhart had told him to send Mr de Wys home and he would be paid for 40 hours per week "regardless". That was repeated at the end of the discussion. Having been told that about his wages Mr de Wys left, intending to self-isolate on the basis of his health condition but willing to return if required for essential work.

[24] Mr de Wys by his evidence creates the picture that SFL was less than strict with its observance of the Covid-19 restrictions on business operations, while he was insistent that they should be properly observed. He thinks that SFL used redundancy as a means of dismissing him because he had been outspoken on the point. Mr Adrian and Mr Welsh say that SFL properly complied with the Covid-19 restrictions, that it took the issue of essential freight only very seriously, it held 5 tonnes of non-essential freight at the Christchurch depot, and that one of its trucks was stopped by Police who found it only carried essential goods. The evidence from Mr de Wys lacks specific details. None of it calls into doubt the evidence of Mr Adrian and Mr Welsh that SFL took its Covid-19 obligations seriously. I accept their evidence on this point. I return later to the selection issue.

[25] Mr de Wys was at home off work when he received Mr Solly's 31 March letter by email.[4] The content of the letter is summarised above. SFL next communicated with Mr de Wys on 2 April.

[26] In his prepared evidence Mr de Wys says that he received the 2 April letter giving him notice of dismissal by email at 3.17pm that day. In his oral evidence Mr de Wys says that he received a phone call from Mr Welsh[5] who told him that Mr Solly had decided to make some staff redundant and "you're one of those selected." Mr Welsh thought he had met with all the affected staff on 2 April but accepted when questioned that he might have phoned Mr de Wys. Mr Welsh did not tell any staff that they were redundant until after he asked Mr Adrian on 2 April to hold off sending the letters. I find that the phone call Mr de Wys received on 2 April from Mr Welsh was when Mr de Wys first knew of his dismissal.

[27] At some point following receipt of the letter giving him "2 weeks notice of termination for redundancy" and advising he would be paid the notice, final pay and

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[4] I am told it was sent at 1.29pm on 31 March but only the letter and not a print of the email was produced.

[5] In evidence, Mr de Wys thought the phone call was a day or two before he received the 2 April letter.

other entitlements on 8 April, Mr de Wys had a discussion with Mr Welsh about the calculation of the notice payment. Mr de Wys sought payment at his average weekly earnings rather than standard ordinary weekly hours. Neither man referred to the four week notice period in the agreement. The payslip produced after the investigation meeting shows the notice period paid at $1,634.59 per week. At some point Mr de Wys also arranged someone to pick up some gear which he had left in the truck. His CB radio and reducer were also returned.

Is the dismissal of Mr de Wys justifiable?

[28] To justify the dismissal, SFL must show its actions and how it acted were what a reasonable employer could have done in all the circumstances at the time of the dismissal.[6] SFL and Mr de Wys must deal with each other in good faith.[7] The duty of good faith requires an employer who is proposing to make a decision that will or is likely to have an adverse effect on the continuation of an employee's employment to provide the employee with access to relevant information and an opportunity to comment on the information before the decision is made.[8] This statutory obligation to consult applies when making an employee redundant.[9]

[29] In a redundancy case the Court of Appeal held:[10]

> If the decision to make an employee redundant is shown not to be genuine (where genuine means the decision is based on business requirements and not used as a pretext for dismissing a disliked employee), it is hard to see how it could be found to be what a fair and reasonable employer would or could do. The converse does not necessary apply. But if an employer can show that the redundancy is genuine and that the notice and consultation requirements of s 4 of the Act have been duly complied with, that could be expected to go a long way towards satisfying the s 103A test.

[30] The Court observed[11] that the explicit disclosure and consultation requirements now mean that the Employment Court (or the Authority) will have before it the information provided by the employer to justify the redundancy as

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[6] Employment Relations Act 2000 s 103A(2).
[7] Employment Relations Act 2000 s 4(1)(a).
[8] Employment Relations Act 2000 s 4(1A)(c).
[9] Employment Relations Act 2000 s 4(4)(e).
[10] *Grace Team Accounting Ltd v Brake* [2014] ERNZ 129 at [85].
[11] *Ibid* at [81].

genuine. It is convenient in this case to deal first with the s 4 notice and consultation issues.

[31] On 26 March when he finished work, Mr de Wys was told by Mr Welsh that "Merv [Solly] …said we're going to pay everybody for 40 hours…" This was reinforced by the message in Mr Solly's 31 March letter that the company had applied for the wage subsidy without a response to date and "If the subsidy is received well and good…", but noting that "…restructure may become necessary in time. We will keep you informed as time goes by." SFL did not communicate further with Mr de Wys until 2 April when Mr Welsh phoned him and told him that he was one of the employees selected as redundant. Mr de Wys then received written notice of his dismissal. The decision was not preceded by any prior consultation on point.

[32] Specifically, the 2 April dismissal letter said:

> … despite attempts to access the Government Wage Subsidy, we have not yet been successful in contacting the relevant Government Department let alone obtain funding. We have received a note from it stating that it has received 320,000 applications as well as ours and have directed us not to telephone it.
>
> Unsatisfactory as this situation is, we cannot just go on waiting, it is necessary for matters to be brought to a head. We have no work and the situation will not change for the foreseeable future.
>
> Sadly, we have to move to redundancies …

SFL declared it was eligible for the Wage Subsidy when it applied 8 days earlier. The 31 March letter reinforced the importance of the subsidy for itself and "even more so to… our valued employees". No information about the circumstances which caused SFL to come to the view that it "cannot just go on waiting" for the subsidy payment but needed to move to redundancies was disclosed to Mr de Wys and he had no opportunity to comment.

[33] Mr Adrian's evidence is that the 2 April letter was drafted by a legal advisor in consultation with Mr Solly. There is no reason to doubt that evidence. The statement in the letter about lack of contact would have been correct when it was drafted but it was not correct when the letter was sent to and received by Mr de Wys in the

afternoon of 2 April. SFL had phone and email exchanges that morning with an MSD official.

[34] In any event, I do not accept that the lack of contact about the wage subsidiary application was not a material factor in the decision to dismiss Mr de Wys. As soon as there was contact, SFL excluded Mr de Wys from the application rather than revisiting its redundancy decision affecting him. On 23 March SFL had initiated the Christchurch selection process which ended with Mr de Wys being dismissed. In the selection list sent on 31 March, Mr Welsh said of Mr de Wys "Mouthy & tries to despatch himself. Hard work at times (Redundant)". The material factors were the decisions to reduce Christchurch staffing, adopt the selection criteria and the application of the criteria to Mr de Wys. These decisions were likely to and did have an adverse effect on the continuation of employment for Mr de Wys. SFL did not provide Mr de Wys with access to any information on these matters and he had no opportunity to comment.

[35] Mr Welsh in his prepared evidence expressed his view that Mr de Wys had damaged gear for a previous employer, constantly complained about a Nelson based driver, formed strong opinions and alienated people, took shortcuts compared to other drivers, was not prepared to work to SFL schedules, was not as careful about tying loads as he should have been and was a difficult person with whom he had differences although they were always resolved. I accept that these views caused Mr Welsh to include Mr de Wys on the 31 March list for redundancy. It is not necessary to make any findings about the grounds for or the validity of the views. None of these views were raised with Mr de Wys and he had no opportunity to comment.

[36] I find that SFL did not comply with the statutory consultation requirements in s 4. The failure to comply with these good faith obligations makes the decision to dismiss Mr de Wys unjustifiable. Nothing more needs to be said about the considerations identified at s 103A(3) and (4) of the Act.

[37] I next consider whether the employer's actions were what a fair and reasonable employer could have done in the circumstances at the time of the dismissal.

[38] In the 2 April letter, SFL says it has no work and the situation will not change for the foreseeable future. SFL knew that it was an essential service and could carry

essential freight, having received that advice on 25 March. It was an overstatement to say that it had no work. However, I accept that the SFL's business would have been affected by the Covid-19 restrictions for the foreseeable future, as at the beginning of April. Mr Adrian's evidence is there was a 34% reduction in revenue April 2020 compared to April 2019. There was a 43% reduction in truck and trailer movements across its Christchurch, Blenheim and Richmond general freighting business between the first two weeks of March 2020 and the first two weeks of April 2020. Mr Adrian's evidence, which I accept, is that the reduction is forecast to be ongoing. In short, SFL at the time of the dismissal anticipated there would be a reduction in business activity and evidence supports that there was a reduction in business activity. Without more, that in turn might have reasonably resulted in a business decision that the company had more employees than were needed.

[39] Compliance with the statutory obligations[12] to raise concerns, allow a reasonable opportunity to respond and genuinely consider any response before a dismissal is part of assessing whether SFL's actions were those of a fair and reasonable employer, given the selection criteria it adopted and applied. SFL is a relatively large private sector employer with access to human resource expertise, legal and other advice. Despite those resources, it did nothing to discharge these obligations.

[40] By its Wage Subsidy application SFL declared that it would use its best endeavours to retain the named employees in employment on at least 80 percent of their regular income for the period of the subsidy. Mr de Wys was named in the application. He left work with an assurance that Mr Solly had said they would pay everyone for 40 hours. In the 31 March letter, Mr Solly confirmed that the company had applied for the subsidy, said that it would make its "best endeavours" to carry on as it has in the past, recognised that those "best endeavours" may not be enough and said that restructure may become necessary in time. Despite the declaration and the statement in the 31 March letter, there is no evidence that SFL took any endeavours to retain Mr de Wys in its employment. Instead, it excluded him from its subsidy application and advised him of its decision to dismiss him.

[41] Considered objectively, no fair and reasonable employer could have decided that Mr de Wys had genuinely become surplus to the company's requirements at 2

[12] Employment Relations Act 2000 s 103A(3).

April, when its communication before then was reassuring about his employment for at least the short term[13] if the subsidy was received. SFL knew or ought to have known that the subsidy would soon be paid.

[42] There is a submission that subjective factors are brought to account in assessing whether an employer's actions are fair and reasonable.[14] The argument is that the company here used its best endeavours to communicate in an open and honest manner and to keep staff informed of its business decisions where the standard expected of a fair and reasonable employer was significantly altered by the context of the global pandemic and economic turmoil. However, the circumstances at the time of the company's actions were such that it could make a wage subsidy application, it could advise Mr de Wys about that, its mangers could communicate to develop and apply a selection process to implement a reduction in its workforce, it could consult with a legal advisor to draft a dismissal letter, it could exclude Mr de Wys from the wage subsidy application and it could tell Mr de Wys that he was dismissed. SFL could have alerted Mr de Wys to its consideration of a workforce reduction, its intention to adopt and apply selection criteria and that there would be exclusions from the wage subsidy. It did not, but that was not forced on it by external factors beyond its control.

[43] I must not determine that a dismissal is unjustifiable solely because of defects in the employer's process if those defects were minor and did not result in the employer being treated unfairly. Good faith is central to an employment relationship. SFL's actions and how it acted denied Mr de Wys any prospect of maintaining the employment relationship. The dismissal is unjustifiable not just due to process defects, the defects were not minor and they did result in Mr de Wys being treated unfairly.

[44] I find that SFL unjustifiably dismissed Mr de Wys and he has a personal grievance.

[45] Mr de Wys identified several issues which he thinks are the genuine reason for his dismissal. Some of these were mentioned by Mr Welsh to support his selection of

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[13] The respondent submits that the 31 March letter advised that a restructure may be "imminent". The letter was reassuring short term if the subsidy was paid. It did not convey that a restructure as "imminent".

[14] See *The Chief Executive of the Department of Corrections* v *Tawhiwhirangi* [2007] 1 ERNA 610. I am also referred to commentary in Stephen Todd (ed) *The Law of Torts in New Zealand*. a

Mr de Wys for redundancy. It is not necessary to canvass these points. They add nothing of substance to the determination that the dismissal is unjustifiable.

[46] SFL breached its employment agreement with Mr de Wys by giving him two not four weeks' notice of dismissal. The breach adds little to the above finding that SFL unjustifiably dismissed Mr de Wys.

Dismissal of Mr Jenney

[47] Mr Jenney was employed from October 2018 as a yardman. After about a year he was promoted to yard supervisor. His signed individual agreement provides for two weeks' notice of termination. The agreement and position description provide that Mr Jenney is based at the Christchurch but shall perform the work at such locations as may be required by the employer. Hours of work are between 40 and 70 in any seven day period.

[48] Mr Jenney continued to attend work following the Covid-19 Level 4 restrictions. He received by email the 31 March letter as did other employees. Its content is summarised above.

[49] On Tuesday 1 April Mr Jenney was at the toolbox meeting when Mr Welsh told those present not to worry too much about redundancy. This referred to the 31 March letter which included that "best endeavours just may not be enough and restructure may become necessary in time." In his evidence Mr Jenny describes being told that their jobs were safe. It was reasonable for him to take from the text of the letter and what Mr Welsh said at the meeting that his job was safe, at least in the short term.

[50] The next day, in the early afternoon, Mr Jenney was asked to come to the office by Mr Welsh. Another manager was also present. Mr Welsh told Mr Jenney that there was a list of seven people in Christchurch being made redundant and that he was one of them. Mr Jenney reacted angrily. Mr Welsh said that they had tried fighting for Mr Jenney to keep his job but it had come from higher up "that's what's happening and that's it." The other manager repeated that they had attempted to keep Mr Jenney on. Mr Jenney was told that hopefully after the lockdown when it goes back to normal he could come back to work. Mr Jenney said "okay", stood up, shook

hands and left the office. At some point Mr Welsh said that Mr Jenney would receive a letter confirming this.

[51] Mr Jenny gathered up his possessions from another building, told a yardman and a driver who expressed surprise at what had just happened to him, and then left the site. He later had a txt exchange with Mr Welsh who confirmed that the dismissal was effective immediately.

[52] When he did not receive the 2 April dismissal letter, Mr Jenney sent a txt to Mr Welsh. Mr Adrian resent it on Friday 3 April to the correct email address.

Is the dismissal of Mr Jenney justifiable?

[53] As with Mr de Wys, SFL must show its actions and how it acted were what a reasonable employer could have done in all the circumstances at the time of the dismissal of Mr Jenney. SFL and Mr Jenney must deal with each other in good faith. SFL when making a decision that will or is likely to have an adverse effect on the continuation of his employment, was required to provide Mr Jenney with access to information relevant to the continuation of his employment and an opportunity to comment.

[54] As with Mr de Wys, I find that SFL did not comply with the s 4 statutory consultation requirements which it owed to Mr Jenney. I summarise these as they applied to Mr Jenney as follows.

[55] Referring to the 2 April letter, no information about the circumstances which caused SFL to come to the view that it could no longer wait for the subsidy payment but needed to move to redundancies was disclosed to Mr Jenney and he had no opportunity to comment. The statement in the letter about lack of contact would have been correct when it was drafted but it was not correct when Mr Welsh told Mr Jenney that he was being dismissed.

[56] The lack of contact was not a material factor in the decision to dismiss Mr Jenney. SFL excluded Mr Jenney from the subsidy application and proceeded with the dismissal, based on the 31 March list recording “Jesse Jenney – Redundant”. Mr Welsh’s evidence is that Mr Jenney was “not particularly reliable”. The operative factors were the decisions to reduce Christchurch staffing, adopt the selection criteria and the application of the criteria to Mr Jenney. These decisions were likely to and

did have an adverse effect on the continuation of employment for Mr Jenney. SFL did not provide Mr Jenney with access to any information on these matters and he had no opportunity to comment.

[57] The 2 April statement that it had no work was an overstatement as SFL knew that it was an essential service and could carry essential freight, having received that advice on 25 March. However, I accept that the business of SFL was affected by the Covid-19 restrictions for the foreseeable future, as at the beginning of April. I have already accepted Mr Adrian's evidence about the reduction in revenue and trucking movement which would have affected the yard work. In short, SFL can show there has been a reduction in its business activity, as it anticipated in late March would be the result of the Covid-19 restrictions. Without more, that in turn might have reasonably resulted in a business decision that the company had more employees than were needed.

[58] However, by its wage subsidy application SFL declared that it would use its best endeavours to retain the employees named in the application in employment on at least 80 percent of their regular income for the period of the subsidy. Mr Jenney was named in the application. In the 31 March letter to staff including Mr Jenney, Mr Solly confirmed that the company had applied for the subsidy, said that it would make its "best endeavours" to carry on as it has in the past, recognised that those "best endeavours" may not be enough and that restructure may become necessary in time. Despite the declaration and the statement in the 31 March letter, there is no evidence that SFL took any endeavours to retain Mr Jenney in its employ. Instead, it excluded him from its subsidy application and advised him of its decision to dismiss him.

[59] The factors in s 103A(3) of the Act apply to Mr Jenney's dismissal with somewhat less significance than with Mr de Wys as SFL had a more positive view of Mr Jenney's assessment against the selection criteria. Non-compliance with good faith obligations is the overwhelming factor here.

[60] Considered objectively, no fair and reasonable employer could have decided that Mr Jenney had genuinely become surplus to the company's requirements at 2 April, when its communications before then were reassuring about his employment at least in the short term if the subsidy was received. The actions of SFL were not those of a fair and reasonable employer.

[61] Mr Jenney's personal grievance arises not just out of process defects, the defects are more than just minor and the defects resulted in him being treated unfairly.

[62] I find that SFL unjustifiably dismissed Mr Jenney and he has a personal grievance.

Remedies for Mr de Wys' personal grievance

[63] Mr de Wys claims compensation of $23,000.000 under s 123(1)(c)(i) of the Act and reimbursement of lost wages under s 123(1)(b) of the Act. Reinstatement is not claimed.

[64] Mr de Wys says he was "really angry" to be made redundant. He says that he lacks motivation and most of the time feels really depressed and angry. There is no reason to doubt this evidence, which I accept.

[65] Mr de Wys says that his truck was soon after relocated to Nelson and given to the driver there who he considered was the source of him getting offside with SFL. There is no evidence to support Mr de Wys' suspicion that this other driver was implicated. Evidence, which I accept, is that the truck was laid up for the period of the lockdown. Mr de Wys' evidence that he was the only driver made redundant is not correct. His view is that SFL used the lockdown to get rid of people "that had annoyed them". It is correct that negative views of Mr de Wys contributed to his selection. However, dismissals arose because SFL decided to respond to the Covid-19 lockdown effects on its business by reducing its workforce. To an extent, the sense of humiliation, lost dignity and injury expressed by Mr de Wys is based on misperceptions about what motivated his dismissal. However, SFL is responsible for that because it did not consult with Mr de Wys about its decision to reduce its workforce and his selection for redundancy.

[66] Mrs de Wys says that Mr de Wys does not sleep properly and complains of the "rage in his mind". She says that Mr de Wys is "always so sad and angry" and it has affected his relationship with his brothers. Mrs de Wys comments on the lack of motivation and Mr de Wys' concern about his employment prospects. I accept all this evidence. Mrs de Wys says that her doctor has told her that Mr de Wys might need to resume medication for his diabetic condition. I do not include this aspect in the present assessment as the evidence does not establish any causative link to the

personal grievance. To the extent that Mrs de Wys gives evidence about the effects on her, I do not include that as relevant to the present issue.

[67] Standing back, these effects suffered by Mr de Wys are of some significance, but at this stage are of relatively short duration. The effects are properly remedied by an award of $10,000.00 compensation under s 123(1)(c)(i) of the Act.

[68] I turn to the claim for reimbursement. Mr de Wys was paid notice for two weeks. He had a contractual entitlement to four weeks' notice. An extra two week must be paid without adjustment for mitigation or contribution (if any).

[69] There is a submission that reimbursement is not available as a remedy because the dismissal is substantively justified for redundancy. The argument is that remedies must be limited to harm caused by an unfair process.[15] For the reasons given above, the company's actions and how it acted were not those of a fair and reasonable employer. I do not accept that the lack of justification is limited to procedural defects.

[70] On 26 May SFL offered to re-employ Mr de Wys on the same terms and conditions treating his service as continuous for leave entitlements. It did not address pecuniary and non-pecuniary losses caused by the dismissal. The offer was not on a without prejudice basis and is in evidence. It was in full and final settlement of the personal grievance. Mr de Wys did not accept the offer, but I do not accept that this was a failure to mitigate loss of wages. It would have bound him to a full and final settlement of his whole grievance claim. Mr de Wys gave another explanation for rejecting the offer but it is not necessary to canvass that.

[71] Mr de Wys told me when questioned that he did not have it in him to apply for other jobs after the dismissal. He said he had not applied for jobs "with his whole heart". I find that Mr de Wys' was demotivated by the having been unjustifiably dismissed. He concentrated on several business opportunities, which did not come to pass. Also in evidence are a number of TradeMe acknowledgements showing applications for a variety of jobs in late May and early June. His evidence during the meeting was that he had been offered a caregiver job on 7 July which he declined. I find that Mr de Wys sufficiently attempted to mitigate his loss of wages until 6 July, but without any success. His loss can be assessed by reference to the notice payment. Each week of notice which was paid to Mr de Wys was at the rate of $1,634.00,

[15] I am referred to *Aoraki* v *McGavin* [1998] 3 NZLR 276.

which was the rate of his average earnings. I take $1,634.00 per week as reflecting his lost wages each week Mr de Wys is entitled to be reimbursed for the period commencing 17 April until 6 July, a total of 11 weeks 4 days. This equates to $18,907.00 (gross), including the unpaid notice period referred to above.

[72] I must consider the extent to which the actions of Mr de Wys contributed to the situation giving rise to the personal grievance and if those actions so require, reduce remedies accordingly. Mr de Wys did not contribute to the situation giving rise to his grievance.

[73] There will be orders requiring SFL to pay Mr de Wys compensation of $10,000.00 and reimbursement of $18,907.00.

Remedies for Mr Jenney's personal grievance

[74] Mr Jenney's evidence is that he was shocked and reacted angrily when told that he was being made redundant. He describes not being able to fend for himself, his partner and his family as "killing me" and worse stress than he has previously experienced. He is constantly argumentative, not sleeping and worried about how they will survive without him having a job. Family relationships are affected. Mr Jenney says it is "really embarrassing" that he needs family financial assistance. Ms Morgan, Mr Jenney's partner, says he was "extremely upset" when he called her shortly after being told that he had lost his job. Ms Morgan in her evidence describes the financial and relationship effects. She says she is unsure how much longer they can continue "like this". It is not necessary to describe the effects in detail but they are significant. The evidence of Mr Jenney and Ms Morgan conveys a sense of hopelessness about the current situation for Mr Jenney. I accept the evidence of Mr Jenney and Ms Morgan about the effects he has suffered as a result of the dismissal.

[75] I assess the effects suffered by Mr Jenney due to his grievance as more significant than Mr de Wys. These effects are properly remedied by an award of $15,000.00 compensation under s 123(1)(c)(i) of the Act.

[76] Mr Jenney was paid the correct notice, so started to lose income from 17 April 2020.

[77] SFL offered to re-employ Mr Jenney, as with Mr de Wys. Mr Jenney also rejected the offer. It is not necessary to canvass the reason given in the reply or as

advanced in evidence. The offer would have bound Mr Jenney to a full and final settlement of his personal grievance. It did not address the pecuniary and non-pecuniary loss caused by the dismissal. Rejecting the settlement offer does not constitute a failure to mitigate loss of remuneration. Other evidence indicates that Mr Jenney attempted to mitigate his loss, and the point is not disputed by counsel. I find that Mr Jenney did so. Mr Jenney's advocate sought an award covering a three month period. As with Mr de Wys, Mr Jenney's lost remuneration can be assessed from the notice payment. It was paid at $1,275.00 per week, reflecting his average earnings at his ordinary time rate. He lost remuneration from 17 April until 8 July (the date of the investigation meeting), a period of eleven weeks and 6 days. That equates to $14,132.00 gross.

[78] Mr Jenney did not contribute to the circumstances giving rise to his personal grievance.

[79] There will be orders requiring SFL to pay Mr Jenney compensation of $15,000.00 and reimbursement of $14,132.00.

Penalty for breach of good faith

[80] A penalty is claimed for breach of good faith, described in the statement of problem as mislead information and a failure to be open and communicate.

[81] A party to an employment relationship who fails to comply with the duty of good faith is liable to a penalty under the Act in three situations.[16] There is no evidence that SFL intended to undermine its employment relationships with Mr de Wys and Mr Jenney or the respective employment agreements. The parties were not bargaining. A penalty under the Act could only be available if SFL's failure to comply with the duty was deliberate, serious and sustained.[17]

[82] I adopt the findings set out earlier that SFL did not comply with its good faith duty to provide access to information and an opportunity to comment on that information before the decision is made. Additionally, the company's actions either misled or were likely to mislead Mr Jenney about his immediate continued job security, when SFL was in the process of selecting him to be dismissed as surplus to

[16] Employment Relations Act 2000 s 4A.
[17] Employment Relations Act 2000 s 4A (a).

the company's requirements. I refer to the 31 March letter and Mr Welsh's comments at the toolbox meeting attended by Mr Jenney. The 2 April dismissal letter was likely to mislead Mr Jenney about the status of the wage subsidy application, especially as it affected him. SFL was not active and constructive in maintaining productive employment relationships with Mr Jenney as it excluded him from the wage subsidy application. Component parts of the company's actions between 23 March and 2 April breached these different formulations of the good faith duty. I treat it as single breach of good faith because all the components arose directly from the dismissal.

[83] Similar conclusions might be available regarding Mr de Wys. I express it that way because of the respondent's submission that an essential ingredient for a breach of s 4(1)(b) is that the person is in fact misled. Mr de Wys expressed some scepticism about some of these actions, indicating that he might not have in fact been misled. In light of the view I have reached about whether a penalty is available, it is not necessary to express a concluded view about whether SFL breached s 4(1)(b) in its dealings with Mr de Wys.

[84] I find that a penalty is not available under s 4A(a) because the breach of good faith was not sustained. Parliament set a high threshold for a party to be liable for a penalty for breach of good faith.[18] Assuming the breach of good faith was both deliberate and serious, it spanned only a little more than a week. A penalty is not available so the claims must be dismissed.

Costs

[85] Mr de Wys and Mr Jenney seek costs on a daily tariff basis. Counsel for SFL did not directly address the point. At this stage, an award seems likely at the daily tariff plus the application lodgement fee. Counsel for SFL may lodge and serve any submission within 14 days if there are grounds to differ from that approach. The advocate for the applicants can then lodge and serve any response within 7 days. Any disputed matter regarding cost will then be determined.

[18] See for example *Radius Residential Care Ltd v New Zealand Nurses Organisation Inc* [2016] NZEmpC 112.

Philip Cheyne
Member of the Employment Relations Authority